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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BROWN UNIVERSITY, *et al.*,
Petitioners,
v.
AMY COHEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICI CURIAE*, HON. J. DENNIS HASTERT OF ILLINOIS, JOHN A. BOEHNER OF OHIO, JACK KINGSTON OF GEORGIA, BILL McCULLOM OF FLORIDA, TOM DELAY OF TEXAS, MICHAEL D. CRAPO OF IDAHO, JOHN SHIMKUS OF ILLINOIS, THOMAS W. EWING OF ILLINOIS, AND OTHER MEMBERS OF CONGRESS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
REASONS FOR GRANTING THE WRIT	4
I. BY GRANTING THE PETITIONER'S PETITION THIS COURT CAN RESOLVE ISSUES INVOLVING THE CONSTRUCTION OF TITLE IX AND THE DEFERENCE TO BE GIVEN AN AGENCY'S POLICY INTERPRETATION	6
A. Whether an Enforcement Policy Is Entitled to the Same Deference as a Regulation	7
B. Whether a "Safe Harbor" Regulation Should Be Interpreted as Creating an Affirmative Obligation	8
C. Whether an Agency Interpretation Creating Gender-Based Classifications Is Entitled to Deference	9
II. BY GRANTING THE PETITION THIS COURT CAN RESOLVE THE ISSUE OF WHETHER TITLE IX IS TO BE CONSTRUED AS ANALOGOUS TO THE CASES ARISING UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964	10
III. BY GRANTING THE PETITION THIS COURT CAN CLARIFY WHETHER PROPORTIONALITY IS A GENDER-BASED CLASSIFICATION	12

TABLE OF CONTENTS—Continued

Page

IV. BY GRANTING THE PETITION THIS COURT CAN RESOLVE WHAT REQUIREMENTS APPLY TO GENDER-BASED CLASSIFICATIONS IN LIGHT OF *COMMONWEALTH OF VRGINIA* 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES — Page

Adarand Constructors v. Pena, —— U.S. ——, 115 S.Ct. 2097 (1995) 4, 12, 13, 14, 15
Atchison, T.&S.F.R. Co. v. Scarlett, 30 U.S. 471, 57 S.Ct. 541, 81 L.Ed.2d 748 (1937) 7
Batterton v. Francis, 432 U.S. 416, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977) 7
Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 1190 (1994) 15
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 14
Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) 6, 9
Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996) 6, 13
Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989) 15
Ensley Brancy, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 15
Favia v. Indiana University of Pennsylvania, 7 F.3d 332 (3d Cir. 1993) 11
Franklin v. Gwinnett County Public School, 503 U.S. 60 (1992) 10
General Electric Co. v. Gilbert, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976) 7
Griggs v. Duke Power Co., 401 U.S. 414 (1971) 11
Hazelwood School Dist. v. U.S., 433 U.S. 299 (1977) 11
Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) 12
Kelley v. Board of Trustees, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 938 (1995) 6, 11, 12
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 11
Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991) 16
Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974) 7
Pederson v. Louisiana State University, 912 F. Supp. 892 (M.D. La. 1996) 3, 6, 13

TABLE OF AUTHORITIES—Continued

Page

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 11
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 16
Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (1993) 10
Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944) 8
St. Mary's Honor Center v. Hicks, 509 U.S. ——, 113 S.Ct. 2741 (1993) 11
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 12
United States v. Commonwealth of Virginia, —— U.S. ——, 116 S.Ct. 2264 (1996) 9, 14, 15
United States v. Mersky, 361 U.S. 431, 80 S.Ct. 459, 4 L.Ed.2d 423 (1960) 7
United Steelworkers v. Weber, 443 U.S. 193 (1979) 12
Yusif v. Vassar College, 35 F.3d 709 11

STATUTES AND OTHER AUTHORITY

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.* 10
Title IX of the Education Amendments of 1972, 20 U.S.C. 1681-1688 2
H.E.W. Policy Interpretation, 44 Fed. Reg. 71,418 (1979) 4
Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc., 1995 Westlaw 835775 (June 28, 1995) 10, 15
Clarification of Intercollegiate Athletics Policy Guidance, U.S. Department of Education Office for Civil Rights (1995) 13
Ginsburg, Sexual Equality under the Fourteenth Amendment and Equal Rights Amendment, 1979 Washington U.L.Q. 161 16

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BRIEF OF *AMICI CURIAE*, HON. J. DENNIS HASTERT OF ILLINOIS AND OTHER MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

Amici Curiae respectfully pray that this Court grant review in this case. *Amici* have obtained consent from all parties to file this brief. Correspondence evidencing consent has been provided to the Clerk of this Court.

INTEREST OF *AMICI CURIAE*

The Honorable J. Dennis Hastert and other Members of Congress have an interest in the issues presented because, as Members of Congress, their duties include drafting new legislation, amending current legislation and overseeing the administrative agencies in their interpretation and execution of legislation.

The *Amici* raise issues of concern to them, which include the manner in which courts and administrative agencies interpret legislation. The decision of the Court of Appeals for the First Circuit, together with decisions from other Courts and opinions and interpretations from the Executive Branch demonstrate that there are significant unresolved issues regarding the meaning of Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX") and the amount of deference which should be paid to administrative agencies in the interpretation of that statute.

The Petition raises issues under the Constitution which have been left unresolved by this Court and which could be resolved here. The unresolved issues have resulted in significant differences of opinion. Resolution of those unresolved issues would clarify the parameters of constitutional prohibitions for both Congress and the Executive.

This Court could resolve the case by deciding any one of the questions presented here. By doing so, this Court would resolve issues that affect Congress in both its legislative function and in its oversight function.

STATEMENT OF THE CASE

The instant case is about far more than whether Brown University may eliminate women's intercollegiate gymnastics and volleyball teams. This case raises several issues of national importance.

The case is about the meaning of an Act of Congress affecting all colleges and universities in this country. At issue is whether an interpretation of that Act made by an administrative agency can be sustained as a matter of statutory construction and constitutional civil rights. The case also presents the issue of the appropriate level of deference to be given to an administrative interpretation, and the appropriate reading of that interpretation.

SUMMARY OF ARGUMENT

At issue in this case is the appropriate construction of Title IX. Brown University is alleged to have violated the Act and discriminated against women in the conduct of its intercollegiate athletic program because the proportion of women to men participating in intercollegiate athletics is not the same as the proportion of women to men in the undergraduate population. Brown has defended on the grounds that the proportion of women to men who are participating is consistent with the proportion of women to men who are interested in participating.

The so-called "proportionality" rule that uses the undergraduate population as the standard arises from a Policy Interpretation promulgated by the Office for Civil Rights of the Department of Education. The "proportionality" standard contained therein is used as a "safe-harbor." In other words, the Office for Civil Rights states that it will not prosecute an institution if it has met the "proportionality" standard.

Several Circuit Courts, including the First Circuit in the *Cohen* decision, have considered the issue and have given the "proportionality" rule the force of a regulation as if it had been promulgated by the Agency as an interpretation and an affirmative requirement of Title IX. One District Judge, Judge Doherty in *Pederson v. Louisiana State University*, 912 F.Supp. 892 (M.D.La. 1996), together with the dissenting Judge in the *Cohen* decision, Chief Judge Torruella, have criticized the "proportionality" standard.

The case, if heard by this Court, would permit the Court to consider and pass on many issues that bear directly on the authority of Congress and the Executive in the areas of affirmative action, agency authority and statutory construction.

These *Amici* request that this Court grant the Petition and consider the issues presented. In so doing, these

Amici request that this Court resolve certain questions regarding statutory construction, the appropriate deference to be given to an administrative enforcement policy and constitutional issues left open by recent decisions relating to discrimination and affirmative action.

REASONS FOR GRANTING THE WRIT

The Petitioner's Petition for Certiorari presents an opportunity for this Court to resolve important issues regarding the construction of Title IX of the Educational Amendments of 1972, the process of statutory construction, and the deference to be paid to an administrative agency's enforcement policies. The Petition also presents constitutional issues regarding affirmative action plans left unresolved by this Court's decision in *Adarand Constructors v. Pena*, ——U.S.——, 115 S.Ct. 2097 (1995).

These *Amici* make no argument as to the merits of the case. Rather, they ask that this Court grant the Petition for the purpose of resolving issues that affect not only Congress and the Executive, but also the operation of virtually all of the colleges and universities in this country and the lives of many student-athletes affected by the interpretation placed on Title IX.

The issues addressed by the Petition are important to Congress because they affect not only the ability of Congress to legislate in important spheres but also the authority of administrative agencies to act under a delegation of power. Therefore, as members of Congress, the *Amici* here ask that this Court grant the Petition for Certiorari.

The history of Title IX and the promulgation of the regulations has already been recounted in the published decisions. The issues here, however, do not arise out of the statute or the regulations, but out of the Policy Interpretation. It is that Policy Interpretation that provides the basis of the claim below that the Act requires a policy of "proportionality." See 44 Fed. Reg. 71,418 (1979).

Brown University challenges the validity of the Policy Interpretation. The Plaintiffs assert that it is a valid exercise of administrative interpretation.

These *Amici* request that this Court review the matter because, no matter which way this Court rules, the underlying issues are important to Congress. While these issues remain unresolved, colleges and universities across the country feel compelled to take actions they might not otherwise take.

These *Amici* are painfully aware that the actions taken by college administrators have a very human cost. As colleges seek to respond to federal regulators and threats of private-party lawsuits, they restrict participation in some athletic programs by setting a limit on the number of student-athletes who can participate. In addition, they feel compelled to eliminate other athletic programs. Each program capped or eliminated represents lost opportunities for student-athletes. While the issues presented here remain unresolved, the cost in terms of lost opportunities will continue. Regardless of the specific obligations that may or may not be imposed on educational institutions in meeting the objectives of the statute, the intent of Title IX was not to restrict opportunities for any group of student-athletes. The current uncertainty as to interpretation, however, produces that very effect.

By resolving the issues presented, this Court can mitigate the human cost and permit colleges to administer their athletic programs for the benefit of athletes, not lawyers and regulators.

I. BY GRANTING THE PETITIONER'S PETITION THIS COURT CAN RESOLVE ISSUES INVOLVING THE CONSTRUCTION OF TITLE IX AND THE DEFERENCE TO BE GIVEN AN AGENCY'S POLICY INTERPRETATION.

At issue is a matter of statutory construction. Was it the intent of Congress to impose a rule under which a lack of "proportionality" constitutes discrimination in inter-collegiate athletics?

Leaving aside the issue of whether such a rule would be constitutionally permissible, various lower courts have determined that that was precisely the intent of Congress. As evidence of that intent, the lower courts have looked not to the language of the Act, not to statements of Members of Congress, not to fully promulgated regulations of the Department of Education, but to an interpretive policy used for enforcement purposes by the Office for Civil Rights to the effect that if a college maintains "proportionality" it will not be charged with discrimination. Some lower courts have stated that such a policy of an administrative agency charged with enforcement of the Act is entitled to deference as to the meaning of the Act and as to the intent of Congress. See *Cohen v. Brown University*, 991 F.2d 888, 896-97 (1st Cir. 1993) (Cohen II), *Cohen v. Brown University*, 101 F.3d 155, 173 (1st Cir. 1996) (Cohen III), *Kelly v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1995) cert. denied, 115 S.Ct. 938 (1995). At least one other court has held the policy is not entitled to deference in determining the intent of Congress. *Pederson v. Louisiana State University*, 912 F.Supp. 892, 914 (M.D.La. 1996).

These *Amici* request that this Court grant the Petitioner's Petition in order to review that analysis. Whether the power of determining Congressional intent should be held by enforcement officers in the various agencies and departments of the Executive Branch is a significant statutory construction issue.

A. Whether an Enforcement Policy Is Entitled to the Same Deference as a Regulation.

In the case below, the First Circuit held that the Policy Interpretation is entitled to deference because it was issued by the agency that issued the regulations, which regulations were issued pursuant to the Administrative Procedure Act. The Interpretation was, therefore, given deference as an indication of the intent of the Agency in issuing its regulations, which regulations were given deference as an indication of Congressional intent.

The question of whether an enforcement policy of an administrative agency should be given deference in determining the intent of Congress has come up before in different contexts. In *Batterton v. Francis,* 432 U.S. 416, 425 n.9 (1977), this Court pointed out the difference between the weight to be given to substantive regulations and the weight to be given to policy interpretation in determining the intent of Congress. This Court said:

> Legislative, or substantive, regulations are "issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law." U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947). See *United States v. Mersky,* 361 U.S. 431, 437-438, 80 S.Ct. 459 4 L.Ed.2d 423 (1960); *Atchison, T.&S.F.R. Co. v. Scarlett,* 30 U.S. 471, 474, 57 S.Ct. 541, 81 L.Ed.2d 748 (1937).
>
> By way of contrast, a court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise. See *General Electric Co. v. Gilbert,* 429 U.S. 125, 141-145, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); *Morton v. Ruiz,* 415 U.S. 199, 231-237,

94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

In this case, the issue is unresolved as to whether the Policy Interpretation is an "interpretive regulation" or a "substantive regulation." Interpretive regulations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. at 140. However, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness of evidence in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* In *Skidmore*, this Court held that the regulation was interpretive and rejected the interpretations as being controlling.

B. Whether a "Safe Harbor" Regulation Should Be Interpreted as Creating an Affirmative Obligation.

Here, the interpretation at issue is, apparently, an exercise of prosecutorial discretion. The Department is exercising its discretion not to prosecute those institutions that lie within the "safe harbor" of prongs one, two or three. Prosecutorial discretion is an important function of the Executive in our system of separation of powers.

Whether such a Policy Interpretation can create substantive rights against all parties not inside the "safe harbor" is an issue important to these *Amici*. In other words, if an agency develops a "safe harbor" is everyone required to sail into it? If someone does not take advantage of it is there a violation of the law?

The issue impacts other cases involving "safe harbor" regulation. Here the "safe harbor" creates a shield. Its purpose was to limit government prosecution to those

institutions outside the shield. If its effect can be to create substantive rights which may be used by private parties against all institutions outside the shield, then these *Amici* and all of Congress will have to scrutinize "safe harbor" regulations more closely.

The Policy Interpretation at issue here provides three "safe harbors" which colleges can use to stay "on the sunny side of Title IX." See *Brown II*. The "safe harbors" are a shield for colleges. Here, the failure to find a "safe harbor" has been used as a sword by the plaintiffs.

These *Amici* request review of this matter to determine whether a "safe harbor" creates affirmative obligations. If, as a matter of construction of the regulations and the underlying legislation, "safe harbors" create affirmative obligations, then these *Amici,* and Congress as a whole, would be obliged to carefully scrutinize and oversee other regulatory actions in which "safe harbors" have been created. Such "safe harbors" are common in the enforcement of the Securities Acts, the Internal Revenue Code and the Antitrust Laws. Congressional oversight would have to be enhanced if those "safe harbors" were to create private, substantive, affirmative rights, swords, as well as shields from government prosecution. In fact, Congress may be reluctant to delegate authority to create "safe harbors".

C. Whether an Agency Interpretation Creating Gender-Based Classifications Is Entitled to Deference.

The Circuit Courts have given deference to the Policy Interpretation even though it creates gender-based classifications. However, in *United States v. Commonwealth of Virginia,* —— U.S. ——, 116 S.Ct. 2264 (1996), this Court held that a state agency's creation of gender-based classifications was not entitled to deference. The unresolved issue is whether *Commonwealth of Virginia* means that no deference is to be given to an agency's creation

of a classification, or whether there is to be a different standard for federal agencies than there is for state agencies.

The Executive Branch is, apparently, equally perplexed about the deference to be given to Congress. The Department of Justice Office of Legal Counsel stated that one of the issues left unresolved after this Court's decision in *Adarand* was "what deference the judiciary should give to determinations by Congress that affirmative action is necessary to remedy discrimination." Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc., 19 U.S. Op. OLC ———, 1995 Westlaw 835775 (June 28, 1995).

Resolution of these issues will impact Congress' ability to legislate and its decisions to delegate authority to federal agencies as well as the level of supervision and oversight required by Congress.

II. BY GRANTING THE PETITION THIS COURT CAN RESOLVE THE ISSUE OF WHETHER TITLE IX IS TO BE CONSTRUED AS ANALOGOUS TO THE CASES ARISING UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Several Circuit Courts have decided cases under Title IX of the Educational Amendments Act. Although the Act itself is facially similar to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the issue of whether to apply the reasoning and the case law that arose under Title VII to cases arising under Title IX remains unresolved in non-employment cases. The question was left open by this Court in *Franklin v. Gwinnett County Public School*, 503 U.S. 60, 65 n.4 (1992).

In 1993, the Tenth Circuit held that Title VII case law under the theory of unintentional discrimination, or "disparate impact", provides the most "appropriate analogue" for cases arising under Title IX. *Roberts v. Colorado*

State Board of Agriculture, 998 F.2d 824, 832-833 (1993). In 1994 the Second Circuit held that Title VII precedent was generally applicable. *Yusif v. Vassar College,* 35 F.3d 709, 714-715. Other Circuits dealing with similar issues under Title IX did not speak to the issue of the application of Title VII analysis. See, *Favia v. Indiana University of Pennsylvania,* 7 F.3d 332 (3d Cir., 1993), *Kelley v. Board of Trustees,* 35 F.3d 265 (7th Cir. 1994), *cert. denied,* 115 S.Ct. 938 (1995).

However, in the decision below the First Circuit rejected the analogy to Title VII cases. The First Circuit stated:

> It does not follow from the fact that 1681(b) was patterned after a Title VII provision that Title VII standards should apply to a Title IX analysis of whether an intercollegiate athletics program equally accommodates both genders . . . . 101 F.3d at 154-155.

Thus, the First Circuit below accepted the rationale of *Roberts,* permitting a claim for unintentional discrimination, but rejecting the safeguards built up by Title VII for unintentional discrimination.

Title VII provides a wealth of case law from this Court and the lower courts regarding what is necessary to prove a claim of intentional and unintentional discrimination. Case law under Title VII provides the elements of a *prima facie* case, *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); provides the elements of a case of disparate impact, *Griggs v. Duke Power Co.,* 401 U.S. 414 (1971); provides guidelines for the use of statistical evidence, *Hazelwood School Dist. v. U.S.,* 433 U.S. 299 (1977); provides the basis for employer defenses, *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); and the bases for disproving such defenses as pretexts, *St. Mary's Honor Center v. Hicks,* 509 U.S. ——, 113 S.Ct. 2742

(1993); provides the analysis for determining who has the burden of going forward with the evidence and the burden of persuasion, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and even provides when a remedial affirmative action plan may be permissible in gender and race-related cases, *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 638-40 (1987).

These *Amici*, as members of Congress, look to judicial construction of similar statutes when enacting subsequent legislation. Congress considers a well-developed body of caselaw as an indication of how courts will act in the future. Here, some lower courts have rejected well-developed analysis where the underlying statutes are virtually identical. Some have incorporated the analysis. As a result, these *Amici* request that this Court grant the Petitioner's Petition in order to resolve the issue of the applicability of the case-law under Title VII.

III. BY GRANTING THE PETITION THIS COURT CAN CLARIFY WHETHER PROPORTIONALITY IS A GENDER-BASED CLASSIFICATION.

Following this Court's holding in *Adarand* several questions remain unresolved. The question arises in this case in the context of whether the "proportionality" standard constitutes a preference.

The First Circuit ruled below that it is not a preference but a remedy. The Seventh Circuit, in *Kelley*, ruled that the "proportionality" standard creates a "gender-based classification system" that "passes constitutional muster because it directly protects the interest of the disproportionately burdened gender . . . ." 35 F.3d at 272. The court held that "proportionality" created a preference but the preference was justified. The District Court for the Middle District of Louisiana stated that the Act itself prohibits

"preferential or disparate treatment" and that the "proportionality" standard therefore violates the clear meaning of the Act. *Pederson v. Louisiana State University*, 912 F. Supp. at 914 (1966).

The Department of Education has taken the position that the standard does not create a gender-based classification because the Policy Interpretation provides means other than "proportionality" to meet its test. (Clarification of Intercollegiate Athletics Policy Guidance, Department of Education, Office for Civil Rights, (1995)). The dissenting opinion in the *Cohen* decision below, however, would find that the so-called second and third prongs are either illusory or exacerbate the effect of the first prong. *Cohen III*, 101 F.3d at 195-97.

The terms "preference" or quota" have become shibboleths in both public and legal discourse. Even the First Circuit below termed Brown University's argument that "proportionality" was an affirmative action program a "talismanic incantation." 101 F.3d at 170.

In the decision below, the First Circuit held that the "proportionality" standard is not an affirmative action plan, a preference or a quota because it is not a voluntary plan adopted "to remedy discrimination . . . by means of specific group-based preference or numerical goals, and a specific timetable for achieving those goals." 101 F.3d at 170. (citing *Adarand*) Rather, the First Circuit held that Title IX is an anti-discrimination statute. The court then likened its enforcement of "proportionality" to school desegregation cases where discrimination had been proved. The court ruled that because Brown had not met the "proportionality" standard in the first place, it was guilty of discrimination, without more. Since discrimination had been proved, the First Circuit reasoned that *Adarand* did not apply. 101 F.3d at 170-171. The dissent argues that the "proportionality" standard does, in fact, create a preference.

These *Amici* do not comment on whether the First Circuit's reasoning is circular and do not argue that the analysis of the dissenting Judge is meritorious. Rather, these *Amici* request that this Court grant the petition to consider whether the "proportionality" standard is a preference, or whether a failure to achieve "proportionality" is, itself, proof of discrimination.

Deciding this case will help give life to the almost meaningless terms "preference" or "quota", and will help define the parameters of coverage of *Adarand* and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Both Congress and the Executive will more readily be able to determine whether and to what extent their actions will be held to be unlawful preferences or merely remedial determinations based on specific findings. The *Amici*, therefore, urge this Court to grant this petition in order to resolve basic issues regarding what is a preference or set-aside program and what is a remedial decree based on findings of discrimination.

IV. BY GRANTING THE PETITION, THIS COURT CAN RESOLVE WHAT REQUIREMENTS APPLY TO GENDER-BASED CLASSIFICATIONS IN LIGHT OF *COMMONWEALTH OF VIRGINIA*.

This Court's decision in *Adarand* resolved several issues regarding race-based affirmative action programs. The issue of whether and to what extent *Adarand* applies to gender-based classifications was left open. Subsequently, in *Commonwealth of Virginia*, this Court required that gender-based classifications must have an "exceedingly persuasive justification." 518 U.S. ——, 116 S.Ct. 2264, 2275-2276 (1996). Both issues could be resolved by this Court by granting the Petitioner's Petition for Certiorari here.

The lower courts have struggled with the issue of whether *Adarand* should apply to gender-based affirmative action plans. The Sixth Circuit has held that gender-based

affirmative action programs are to be analyzed in the same manner as race-based programs. *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989); see also, *Brunet v. City of Columbus*, 1 F.3d 390, 404 (6th Cir. 1993), cert. denied, 114 S.Ct. 1190 (1994). Other Circuits have held otherwise. See, *e.g., Ensley Brancy, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994). In the case below, the First Circuit held that the focus on "exceedingly persuasive justification" in *Commonwealth of Virginia* did not change the standard used to evaluate gender-based classifications for the past 20 years.

The confusion does not end with the lower courts. The Justice Department's Office of Legal Counsel does not necessarily see eye-to-eye with the Department's own Solicitor General. On June 28, 1995, the Attorney General issued an opinion that *Adarand* had no effect on gender-based affirmative action programs. The OLC stated:

> *Adarand* did not address the appropriate constitutional standard of review for affirmative action programs that use gender classification as a basis for decision making. Indeed, the Supreme Court has never resolved the matter. However, both before and after *Croson*, nearly all circuit court decisions have applied intermediate scrutiny to affirmative action measures that benefit women. The Sixth Circuit is the only court that has equated racial and gender classifications: purporting to rely on *Croson*, it held that gender-based affirmative action measures are subject to strict scrutiny. *Conlin v. Blanchard*, 890 F.2d at 816. That holding has been criticized by other courts of appeals, which have correctly pointed out that *Croson* does not speak to the appropriate standard of review for such measures. Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Pena, U.S. Department of Justice, Office of Legal Counsel, *supra*.

The position of the Attorney General is that gender-based classification programs could continue in spite of

Adarand. However, the opinion of the Attorney General is not universally held. Even the Attorney General has argued that official discrimination based on gender should be scrutinized in the same light as discrimination based on race. Brief of United States in *Commonwealth of Virginia*. If race and gender discrimination are to be subject to the same level of scrutiny, then the rationale for refusing to apply *Adarand* to gender-based affirmative action plans is lost.

The issue of the level of scrutiny to be applied in gender discrimination cases under the Fourteenth Amendment compared with the level of scrutiny to be applied in the so-called benign discrimination setting of affirmative action plans based on gender has been left open to interpretation by lower courts and commentators. The Seventh Circuit has noted the anomaly that would exist by judging a gender-based affirmative action program by a less severe standard than a race-based program since the race-based program is designed to cure the more invidious discrimination. *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991).[1] The same anomaly has also been the subject of commentators for many years. See, *e.g.*, Ginsburg, Sexual Equality under the Fourteenth and Equal Rights Amendments, 1979 Washington U.L.Q. 161, 170.[2]

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[1] *Milwaukee County Pavers* is a post-*Croson* decision. There Judge Posner raised the anomaly but did not rule on it because the State of Wisconsin waived the argument by conceding that *Croson* applied to gender-based affirmative action programs.

[2] In discussing questions left unresolved by Justice Powell's opinion in *Regents of the University of California v. Bakke* (438 U.S. 265 (1978)) Professor Ginsburg asks:

> Did Justice Powell mean law-sanctioned preferential treatment for women should be less vulnerable to challenge than preferential treatment for racial and ethnic groups saddled with "a lengthy and tragic history" of adverse discrimination?

Professor Ginsburg answers: "That seems an anomalous position."

Congress needs guidance on this issue so that it knows what action it can take regarding gender-based classifications. Granting the Petitioner's Petition here will give this court the opportunity to clarify its holding in *Adarand* and to give meaning to the language in *Commonwealth of Virginia* requiring an "exceedingly persuasive justification" for parties seeking to defend a gender-conscious exercise of government authority. Granting this Petition will help guide Congress and the lower courts in an area of constitutional interpretation, subject to debate within the other two branches of government, and, apparently, within the Executive Branch itself.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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